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(4)

No. 06-1193

In The

Supreme Court of the United States

CHRISTOPHER M. GAMBLA,

Petitioner,

v.

KIMBERLY K. WOODSON,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR REHEARING

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GROUNDS FOR PETITION FOR REHEARING

In addition to the reasons previously provided for granting the writ of certiorari (given in the petition for writ of certiorari and reply to brief in opposition), the petitioner provides the following substantial grounds not previously presented.

A. The Treatment Of Race In Adoption Versus Custody Contexts Conflicts.

42 USC 1996b, Interethnic Adoption, states in part:

> (1) Prohibited conduct
>
> A person or government that is involved in adoption or foster care placements may not --
>
> (A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or
>
> (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

Similarly, the State of Illinois, in 20 ILCS 505/7(e), states, "The Department in placing children in adoptive or foster care homes may not, in any policy or practice relating to the placement of children for adoption or foster care, discriminate

against any child or prospective adoptive or foster parent on the basis of race."

The Illinois Second District Appellate Court held in the instant case, however, that "race may be considered" in determining child custody "so long as race is not the sole consideration for custody decisions, but only one of several factors." *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847 (Ill. App. Ct. 2d Dist. 2006).

Today in the State of Illinois, the act of discriminating on the basis of the race of an adoptive or foster parent or child is unlawful when placing children in adoptive or foster care. Yet, the act of discriminating on the basis of the race of a biological parent or child (where they each obviously share the same race, as in the instant case) is not necessarily unlawful when placing children for custody. Because of the federal statute that exists and the interpretations of *Palmore v. Sidoti*, 466 U.S. 429 (1984) by many states that allow the consideration of race in child custody determinations, this double standard - one for the adoption/foster care context and another for the child custody context - exists outside Illinois as well.

After all briefs were filed in the instant case, Attorney David D. Meyer lectured at the University of Florida in August 2007, on the role of race in decisions about the placement of children. The title of the lecture was "Palmore Comes Of Age: The

Place Of Race In The Placement Of Children." Appendix.

The lecture states, "Recently, new developments have only underscored the murkiness of the legal landscape" when it comes to the consideration of race in decisions about the placement of children.

> Indeed, the developments seem to point in opposite directions at once. On one hand, in the summer of 2006, an appellate court outside Chicago became the latest to read Palmore narrowly. So long as race is not the sole factor, the court ruled, state actors are free to take race into account with other factors in deciding with whom a child should live. Palmore had nothing to say, the Illinois court held, about a divorce court's decision to use race as a "tipping factor" in determining that a biracial child would be better off with her African-American mother than with her white father. In this view, the Constitution poses a barrier only to the most ham-handed uses of race in custody, leaving the state with broad discretion to weigh race flexibly alongside other considerations in determining a child's best interests.
>
> At the same time, however, the federal government has launched a new and aggressive campaign against race-matching in adoption. This campaign reads Palmore

> broadly to condemn virtually all race-conscious decisionmaking in the placement of children. In this view, even inquiring into a prospective adoptive parent's plans for dealing with the special challenges of a transracial placement is said to constitute race discrimination prohibited by federal statutes and, ultimately, the Constitution.
>
> Court decisions such as the one from Illinois would categorically open the door to free-wheeling considerations of race, while the new federal enforcement policy would slam the door shut except in the narrowest imaginable exceptions. Appendix 4a-5a.

The unresolved question, then, is, what role should race play in decisions about the placement of children?

> [A]s the Illinois court's recent decision in Gambla reflects, many observers continue to believe that race remains a relevant and often important factor in determining the custodial and familial associations of children. The Illinois court, like others before it, resolved the tension by allowing for race to be freely considered in placing children, so long as race is not given overtly dominant weight. That is progress, to be sure - it removes at least the most heavy-handed categorical uses of race as a qualifying characteristic for parenthood - but it plainly leaves the door open for wide

> reliance on racial preferences and stereotypes that are wholly unsupported and unsupportable.
>
> In stark contrast, the aggressive posture recently taken by HHS [(the Department of Health and Human Services)] in interpreting federal law effectively pushes race entirely from the field of relevant considerations. Its hostility to considerations of race is so strong that it would forbid not only preferences for same-race placements, but even inquiring into the preparedness of transracial adopters to protect their children against racial prejudice. Appendix 31a.

While the consideration of race in these contexts - adoption/foster care and child custody - have progressed, they have done so in opposite directions. The nature of the legal constraints on considerations of race in public decisions about children remains contested and unsettled. Appendix 30a. For this reason, the petitioner respectfully requests the Court to grant his petition for rehearing of the order denying his petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 06-1193

CHRISTOPHER M. GAMBLA

Petitioner,

v.

KIMBERLY K. WOODSON,

Respondent.

As required by Supreme Court Rule 44.2, I certify that the petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2007.

Christopher M. Gambla

APPENDIX

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LECTURE: PALMORE COMES OF AGE: THE PLACE OF RACE IN THE PLACEMENT OF CHILDREN

NAME: David D. Meyer*

BIO: * Mildred Van Voorhis Jones Faculty Scholar and Professor of Law, University of Illinois College of Law. I am grateful to Professors Nancy Dowd and Barbara Bennett Woodhouse, directors of the University of Florida's Center on Children and Families, for the invitation to deliver this Weyrauch Distinguished Lecture in Family Law, and to Professor Walter Weyrauch for the example of his work.

TEXT:

I. Introduction

It is a great privilege to inaugurate this Lecture in honor of Walter Weyrauch. Professor Weyrauch's contributions to the fields of family law and comparative law are legendary. He has blazed multiple trails in legal scholarship, and a unifying

hallmark of his work is that he approaches every topic with imagination and an open mind, driven by a desire to understand how the law is actually lived. Professor Weyrauch's scholarship reminds us at every turn that the law is not to be found exclusively or even predominantly in law libraries and courthouses. Whether studying the legal traditions of the Romani people or how legal norms might govern outposts in space, Professor Weyrauch explores the complex ways in which law is interwoven with culture and occupies the interstices of human relationships, always paying close and respectful attention to the facts. n1 It is difficult to imagine a more useful model for the study of family law.

Among the many landmarks in his scholarship, Professor Weyrauch has written perceptively about race discrimination in this country and about the status of vulnerable groups more generally. n2 His work in this vein is partly the inspiration for my topic here-the role of race in decisions about the placement of children. A second inspiration is place, because Central Florida provided a particularly important legal landmark in this field: the Supreme Court's 1984 decision in Palmore v. Sidoti. n3

Race in the placement of children has been a flashpoint for decades. Given that the topic joins two of the most charged subjects in American society, race and child welfare, it could hardly be otherwise. n4 From one perspective, the child- welfare system callously ignores or discounts the costs of state intervention borne by African American and other

minority families. n5 From another, race is too often thrown out as an obstacle to doing what is best for children and for the broader society. n6 Observers often seem to agree that placement decisions are distorted by unfortunate "racial politics," even when they fundamentally disagree about the direction of the distortion. n7

In Palmore, the Supreme Court intervened pointedly to curb reliance on race. n8 Ruling in a divorce case out of Tampa, the Court held that the Equal Protection Clause did not permit a state court to transfer custody of a child based on her mother's decision to marry a man of a different race. n9

Palmore's intervention, however, plainly did not end the debate over whether race may be considered in matters of custody and adoption. n10 In the more than two decades since Palmore, courts, legislators, caseworkers, and adoption agencies have continued to struggle, often heatedly, to define the appropriate role for race in the placement of children. n11 Years after Palmore, states continued to adhere to statutes or other legal guidelines establishing priorities or preferences for same-race placements, sometimes specifying the length of time children would be kept waiting while caseworkers searched for willing adoptive parents of the child's race. n12 Even after Congress enacted legislation in the mid-1990s effectively extending Palmore's prohibition of race discrimination to the context of foster care and adoption, observers clashed over whether federal law

did not leave some wiggle room for "reasonable" considerations of race. n13

Recently, new developments have only underscored the murkiness of the legal landscape. Indeed, the developments seem to point in opposite directions at once. On one hand, in the summer of 2006, an appellate court outside Chicago became the latest to read Palmore narrowly. n14 So long as race is not the sole factor, the court ruled, state actors are free to take race into account with other factors in deciding with whom a child should live. n15 Palmore had nothing to say, the Illinois court held, about a divorce court's decision to use race as a "tipping factor" in determining that a biracial child would be better off with her African- American mother than with her white father. n16 In this view, the Constitution poses a barrier only to the most ham-handed uses of race in custody, leaving the state with broad discretion to weigh race flexibly alongside other considerations in determining a child's best interests.

At the same time, however, the federal government has launched a new and aggressive campaign against race-matching in adoption. n17 This campaign reads Palmore broadly to condemn virtually all race-conscious decisionmaking in the placement of children. n18 In this view, even inquiring into a prospective adoptive parent's plans for dealing with the special challenges of a transracial placement is said to constitute race

discrimination prohibited by federal statutes and, ultimately, the Constitution. n19

In this Lecture, I want to examine these contending understandings of the legal constraints on considering race in matters of child welfare and suggest that both are wrong. What both approaches share in common is a craving for a bright-line solution: Court decisions such as the one from Illinois would categorically open the door to free-wheeling considerations of race, while the new federal enforcement policy would slam the door shut except in the narrowest imaginable exceptions. My own view is that the Constitution does not provide such neat solutions. Strict scrutiny, properly understood, requires that any consideration of race must be justified by a persuasive demonstration that it yields very substantial benefits to children. I doubt that placement could often be denied on grounds of race under this standard, but neither do I believe that it mandates the unyielding color-blindness contemplated by federal officials and some scholars.

A frustrating feature of this understanding is that it would leave to case-by- case determination whether race could legitimately factor in to a placement decision. But this inefficiency is, in my view, an unavoidable result of the need to balance the Constitution's rightful skepticism of race-conscious decisionmaking by the government against the sometimes compelling needs of individual children.

I arrive at this conclusion in three steps. First, I describe briefly the key landmarks that frame the debate over race and child custody, including the Court's decision in Palmore and Congress's enactment and subsequent amendment of the Multiethnic Placement Act (MEPA) in the mid-1990s. n20 This will be familiar ground for many, but a brief orientation is necessary for what follows. Second, I turn to the recent judicial and administrative rulings, and contend that they either understate (in the case of the court opinions) or overstate (in the case of the administrative rulings) the constitutional and statutory constraints. Finally, I will close by suggesting what I see as the proper limits in this area.

I should emphasize the modesty of my project. I certainly do not claim to offer a comprehensive account of the enormously complex issues raised here, including the meaning of race, its significance to children, and the desirability or feasibility of aspiring to a "color-blind" society. All I can hope to accomplish in this brief space is to clear away some of the brush in recent arguments and to identify the relevant legal standards that should guide court decisions in this area. Given the confines of this platform, what follows necessarily appears in broad strokes. But I hope that it may suggest an analytical foundation upon which future arguments and empirical data might be organized.

II. History and Landmarks in the Battle Over Race and Custody

At the outset, it is worth recalling that laws regulating race in child placement were once an integral feature of Jim Crow. Statutes in Louisiana and Texas expressly prohibited adoption across racial lines. n21 And scholars have catalogued the extraordinary lengths to which state actors sometimes went to police the racial boundaries of family life in adoption and custody. In his book Interracial Intimacies, Randall Kennedy, for example, recounts the Kafkaesque story of Jacqueline Henley, a biracial child who could not be adopted by the African American foster parents who cared for and loved her, solely because she had been classified as "white" when she was born. n22

In other jurisdictions where no such laws existed, social norms achieved the same result. There are almost no recorded instances of formal transracial adoptions before World War II. n23 The practice remained no more than a trickle until the 1960s, when the integrationist ideals of the Civil Rights era spurred new interest. n24 The number of Black children adopted by white parents shot up from 733 nationwide in 1968 to 2,574 just three years later. n25

Then, the bottom fell out. One year later, in 1972, the National Association of Black Social Workers (NABSW) famously condemned the adoption of Black children by white families in incendiary terms,

describing it as a "form of genocide." n26 Child welfare agencies pulled back, and in two years the number of transracial adoptions had been cut in half. n27

A parallel debate was unfolding at the same time concerning the adoption of Native American children. Critics charged that child welfare authorities were tearing apart tribal communities and threatening their future by removing large numbers of Indian children and placing them into non-Indian homes. n28 Evidence in the early 1970s suggested that roughly a third of Indian children had been removed from their families and placed out through adoption or foster care. Overwhelmingly, these placements were in non-Indian homes. n29

In 1978, Congress acted to curb Indian adoptions through the Indian Child Welfare Act (ICWA). n30 ICWA requires deference in many cases to tribal courts. It directs that Indian children should be placed within the tribe, or with other Indian families whenever possible, and with non-Indians only as a last resort. n31 Many state child-welfare and adoption agencies embraced similar rules for transracial adoptions, sometimes requiring lengthy efforts to find a same- race placement before resorting to adoption across racial lines. n32

But just as race was looming ever larger as an obstacle to adoption, two important developments pushed back in the other direction. The first was the Supreme Court's 1984 decision in Palmore. Palmore

concerned custody after divorce, not adoption, but it had potentially broader implications. n33 Linda and Anthony Sidoti, both white, had divorced in 1980, and Linda had won custody of their three-year-old daughter, Melanie. n34 A year later, after Linda moved in with and planned to marry an African American man, Anthony sought a change of custody and the trial judge assented. n35 The judge explained that "there is no issue as to either [parent's] devotion to the child . . . or respectability of the new spouse," and insisted that "[t]he father's evident resentment of the mother's choice of a black partner [was itself] not sufficient to wrest custody from the mother." n36 But the judge reasoned that it would be in Melanie's "best interests" to avoid the "peer pressures" and "social stigmatization" sure to be visited upon an interracial household. n37

The Supreme Court, in a unanimous opinion by Chief Justice Burger, held that the trial court's custody order in Palmore violated the Equal Protection Clause. Because the state court's custody decision turned on a racial classification, it triggered the "most exacting scrutiny," requiring proof that the classification was necessary to the achievement of a compelling state interest. n38 Burger's opinion allowed that protecting a young child's welfare was a state "duty of the highest order," but then failed to follow up by asking whether the change of custody was in fact necessary, or narrowly tailored, to protect Melanie's welfare. n39 Instead, the Court's opinion turned on a dime, effectively implying that the inquiry was beside the point: "[W]hatever problems

racially mixed households may pose for children," the Court ruled, cannot sustain state action premised on racial prejudice n40 :

> The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. . . . [T]hey are not. . . . Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. n41

Palmore dealt only with a parental custody dispute. But its willingness to subject race-conscious custody decisions to strict scrutiny-and its condemnation of state efforts to shield children from racial prejudice by removing them from otherwise proper placements-cast a shadow over state preferences for same-race adoption as well. Any doubt on this score was removed by the enactment of the Multiethnic Placement Act (MEPA) in 1994. Even before MEPA, title VI of the Civil Rights Act of 1964 had broadly prohibited race discrimination in "any program or activity" n42 receiving federal funds-a statutory prohibition understood to be coextensive with the constitutional guarantee of equal protection. n43 MEPA was meant to give more specific content to this general guarantee by clarifying that any recipient of federal funds in the fields of foster care

or adoption may not "delay or deny the placement of a child" on grounds of race. n44

The original version of MEPA, passed in 1994, prohibited "delay[ing] or deny[ing] the placement" or "categorically deny[ing]" the chance to be a foster or adoptive parent "solely on the basis of . . . race." n45 The Act also expressly allowed agencies to "consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster . . . parents to meet the needs of a child." n46 The Act was significantly amended in 1996, stiffening the prohibition by dropping qualifying terms such as "categorically" and "solely," as well as the express allowance for evaluating race and cultural competence of prospective parents. As amended, the Act now prohibits, without qualification, "delay[ing] or deny[ing] the placement of a child . . . on the basis of race, color, or national origin." n47

MEPA thus opened doors to transracial adoption that had been at least partly closed since the 1970s. n48 MEPA's timing also coincided with the enactment of another important federal statute, the Adoption and Safe Families Act of 1997 (ASFA). n49 ASFA aimed to quicken the pace of adoptions generally by limiting states' obligations under pre-existing federal law to attempt family reunification before terminating the rights of abusive or neglectful parents. n50

The combined effect of MEPA and ASFA has been significant. The number of adoptions overall has

more than doubled since ASFA took effect, and in some states, it has tripled. n51 Furthermore, a greater share of these adoptions cross racial lines: in 1998, fourteen percent of Black children adopted from foster care were adopted by a family of a different race; in 2004, the number had climbed to twenty-six percent. n52 While resistance to transracial adoption has declined, it is clear that many child-welfare professionals continue to believe, as a federal Interagency Task Force on Adoption stated in 1988, that "[a]ll things being equal, it is preferable to place a child in a family of his own racial background." n53 What is far less clear, especially after the amendments tightening MEPA, is whether it is legal for adoption workers to act on that belief.

III. Recent Developments-Diverging Paths on the Relevance of Race

Two recent developments highlight the range of opinion on the permissibility of considering race in making placement decisions for children. One suggests a broad allowance for race-matching, while the other suggests almost none. There is reason to think that neither is quite right.

A. Barring Consideration of Race Only as the "Sole" Basis for a Custody Decision: In re Marriage of Gambla

The Illinois case, In re Marriage of Gambla, n54 involved the divorce of an interracial couple. Both

the husband, Christopher (who was white), and the wife, K berly (who was African American), sought sole cu dy of their only child, three-year-old Kira. Both of the experts in the case who had been qualified to offer opinions about Kira's best interests concluded that she would be better off with her father. n55 They based this judgment partly on observations of the parties' interactions, the mother's idiosyncratic views about conventional medical care, and some history of the mother obstructing the father's access to Kira. The trial court discounted the experts, however, and found both parents to be perfectly equal with respect to each "best interests" factor. n56 The deadlock was finally broken by considering race:

> The trial court noted that Kira would have to learn to exist as a biracial woman in a society that is sometimes hostile to such individuals and that Kimberly would be better able to provide for Kira's emotional needs in this respect. The trial court believed that this factor tipped the scale slightly in Kimberly's favor, and it awarded Kimberly sole custody of Kira. n57

Reviewing this decision, the Illinois Appellate Court found that this approach comported both with state law and the constitutional dictates of Palmore. The state court reasoned that, in Palmore, "the custody award was unconstitutional, not because the trial

court considered race, but because the trial court considered solely race." n58 The court concluded that "so long as race is not the sole consideration for custody decisions, but only one of several factors, it is not an unconstitutional consideration." n59 The court noted that this view was supported by "[v]olumes of cases from other jurisdictions" interpreting Palmore in the same way. n60 Under this reading of Palmore, the Illinois trial court's use of race was unproblematic because race was certainly not the only factor considered, it was just the only distinguishing factor.

This understanding of Palmore is almost certainly incorrect. As an initial matter, it is simply wrong to say that the Palmore trial court had considered only race. To the contrary, the court in Tampa had considered a series of allegations by the father about the mother's neglectful caregiving, n61 but implicitly rejected these claims, finding "no issue as to either party's devotion to the child." n62 The court then went on, as did the trial court in Gambla, to consider race, a consideration that ultimately carried the day. In neither case, then, was race the "sole consideration" relevant to custody.

Nor, in any event, is there much analytic substance to the distinction between using race as a "sole" factor and using it to "tip scales" that would otherwise be balanced differently. The distinction recalls the debate in the Supreme Court's affirmative action cases over the relative weight to be assigned to race in admissions decisions. In Regents of the

University of California v. Bakke, n63 Justice Powell valorized the use of race as a soft "plus" factor in a broader mix of diversity considerations, contrasting the overly rigid way in which the University of California-Davis medical program made race effectively the sole qualifying characteristic for its set-aside seats. n64 More recently, in the University of Michigan cases, the Court disparaged the undergraduate admissions program for rigidly quantifying the comparatively higher value it assigned to race as compared to other diversity factors. n65 It is important to remember, however, that the Court's evaluation was relevant to its determination of whether the racial classifications could be considered "narrowly tailored" to the compelling goal of diversity. By contrast, Gambla and similar cases have instead looked to the relative weighting of race to decide whether the classification should be subject to strict scrutiny in the first place.

Other courts have tried slightly different gambits to cabin or sidestep entirely the application of equal protection principles to race-based child-placement decisions. In an en banc decision in 1977, the former Fifth Circuit reasoned that race-matching should not be considered a suspect racial classification because race was considered only in "a nondiscriminatory fashion." n66 "Impact alone does not sustain a claim of racial discrimination," the court noted. n67 Rather, intent to discriminate must also be shown, and "[t]here has been no suggestion . . . that the defendants had any purposes other than to act in the best interests of the child when it considered race."

n68 This reasoning, however, conflates motivation and intent. The Supreme Court has now clearly held that all classifications intentionally drawn on the basis of race are subject to strict scrutiny, even if the motivations behind the classification are benign. n69

The former Fifth Circuit also sustained consideration of race in adoption by fitting it within broader policies to match adoptive parents and children according to all physical features, including eye color, hair color, facial features, and so on, on the "belief that a child and adoptive parents can best adjust to a normal family relationship if the child" n70 can pass as a genetic offspring. The court freely allowed that it did "not have the professional expertise to assess the wisdom of that type of inquiry," but deferred because the supposed benefit is plausible. n71

Here again, the court's reasoning begged the question. The court's deference would be appropriate if only the rational-basis test applied; but strict scrutiny cannot be avoided simply by packaging race alongside non-suspect classifications. Under strict scrutiny, a court must be convinced of the "wisdom" and demonstrated necessity of using suspect classifications; plausible conjecture is not enough. n72

Contrary to the artifices found in these cases, both old and new, all race- conscious government decisionmaking must be subjected to strict scrutiny. There is no basis for placing race-based decisions in the context of adoption and custody as somehow

outside the scope of heightened constitutional review.

B. The Move Toward Color-Blindness in Federal Enforcement Policy

While Gambla has sought to narrow Palmore almost to its facts, officials in the federal government lately have been seeking to push Palmore to its outer limits. Writing in 2003, Randall Kennedy forecast dim prospects for aggressive enforcement of federal civil rights law against adoption agencies. He observed that the U.S. Department of Health and Human Services (HHS), the agency charged with enforcing MEPA and related laws against race discrimination, was dominated by "well-entrenched officials . . . [who] were opposed to the law in the first place" and were unlikely to take any "aggressive steps" to enforce it. n73 Yet, even while Professor Kennedy's book was probably at press, officials in the HHS Office for Civil Rights were preparing a 60-page letter finding Hamilton County, Ohio, and the State of Ohio in violation of title VI and MEPA. n74 Although the agency had launched more than 130 investigations over the previous 5 years, this was the first time it had issued a formal letter finding a violation.

The enforcement letter marks an important turning point in the federal government's understanding of the legal strictures on race-matching. n75 The letter ruling, based on an investigation into adoptions in the Cincinnati area spanning more than four years,

catalogued a series of illegal practices, both in agency policies and in individual adoptive placements. It began with the case of two- year-old Leah Hahn (a pseudonym assigned by HHS). n76 Leah, who is African American, had been born with Fetal Alcohol Syndrome and a form of dwarfism. After she had been in the permanent custody of the county for about six months, a married couple, the Atkinsons, inquired about the possibility of adopting her.

The Atkinsons appeared in many respects to be an ideal placement. They had three biological children, each of whom had significant special health needs, and they were longtime foster parents to a fourth child, an Alaskan Native who, like Leah, had a form of dwarfism as well as other special needs. The Atkinsons learned about Leah from Little People of America, a national advocacy group in which the Atkinsons were active. There was, however, a potential catch: The Atkinsons were white and lived in North Pole, Alaska, a suburb of Fairbanks. n77

Caseworkers in Cincinnati responded cautiously to the Atkinsons' expression of interest. They wanted to know how many African Americans lived in Alaska and in the area where the Atkinsons lived. They asked about the racial composition of the Atkinsons' church and school system. Finally, some caseworkers were concerned about the Atkinsons' stated intention to raise Leah in "a color-blind manner"; one caseworker expressed the view that "there [is] no such thing as 'color blind.'" n78

The agency decided to wait on consideration of the *Atkinsons' application to see if* alternative placements might be found. n79 After several months, the agency matched Leah with an African American woman in Columbus, Ohio, who ultimately decided that she did not want to adopt a child with dwarfism. n80 Thereafter, Leah was adopted by a white woman in Cleveland. n81 Although the new mother was white, HHS found that race still drove the agency's decision. n82 It noted that "this placement was looked upon favorably by [the county agency] because [the woman's] neighborhood was integrated, and some of her family members were biracial." n83

HHS held that this consideration of race violated title VI, n84 the statutory ban on race discrimination that parallels the U.S. Constitution's guarantee of equal protection. n85 The agency had both delayed and ultimately denied the Atkinsons' application on grounds of race. n86 HHS did not base its finding only on the county's decision to defer its decision on the Atkinsons. It also held that the agency had no business inquiring about the racial diversity of the Atkinsons' community and social circles, or their plans for addressing Leah's racial identity. n87 As HHS saw it, the county's selective inquiry into community diversity and plans for addressing a child's racial heritage only in cases of transracial adoption showed that "different standards" applied depending on the race of the applicants. Such discrimination, HHS ruled, could not be justified by "generalized assumptions and stereotypes of parents

based on their race"-such as that African American parents are specially able to guide African American children in coping with racial prejudice. n88 Instead, under strict scrutiny, any inquiry relating to race must be supported by exceptional facts suggesting that a particular child has a peculiar and compelling need for a same-race placement. n89 Under this approach, for instance, it might be permissible to consider race in placing an older teenager who was adamant in resisting placement with white parents; but broader assumptions about the benefits to children of interacting with adults who share the child's racial background are impermissible. n90

In a separate Penalty Letter, HHS ultimately fined Ohio $ 1.8 million for its repeated transgressions. n91 In practical terms, the amount of this penalty may be as significant as the legal reasoning that underlies it. As Elizabeth Bartholet rightly points out, HHS's willingness to impose-for the first time-such a severe financial penalty "raises the stakes in a way that agency directors and agency workers will not be able to ignore." n92

HHS underscored its newly aggressive commitment to prohibiting race-matching in a second enforcement action against South Carolina in 2005. n93 As in the Ohio enforcement action, the Department found that the State's routine practice of subjecting "families who were willing to adopt transracially . . . to an extra layer of scrutiny to assess their ability to adopt transracially" violated both MEPA and title VI. n94 HHS opined that "assessing the race and ethnicity of

the parents' friends, the race and ethnicity of the members of the parents' church, the race and ethnicity of the parents' neighbors, and the racial and ethnic make-up of nearby schools," and generally "forc[ing] the prospective parent to defend their ability to nurture a child of a different race or ethnicity," was illegal. n95 So, too, was asking prospective transracial adoptive parents whether their extended families would welcome a child of a different race or whether their neighbors would react with hostility. n96 In short, "[a]n evaluation system which assesses a parent's ability to adopt transracially evaluates applicants differently on the basis of race, color or national origin, and thus violates Title VI." n97 The Department fined South Carolina $ 107,481. n98

IV. Toward a New Understanding of the Scrutiny Required of Race-Conscious Custody Decisions

HHS's rigid view of the legal strictures on race in child placement could not be more different from the almost-anything-goes attitude exemplified by the Illinois court's decision in Gambla. Whereas Gambla was prepared to validate almost any use of race as a factor in placement decisions, so long as it was not exclusive, HHS would permit almost none. Indeed, even assuming that transracial placements raise unique child-welfare issues appears to skirt the law, in the agency's view. HHS's hostility to race-matching is certainly more in keeping with the tenor of MEPA's evolution toward color-blindness in adoption and foster care, but in some respects may

go too far. The Department is right to subject race-based decisions to strict scrutiny. Title VI, after all, follows constitutional standards in scrutinizing race discrimination, and MEPA ties its standards to title VI. But there is reason to doubt that strict scrutiny so tightly limits government inquiry into race.

In one important respect, HHS's view of strict scrutiny is actually too loose. The Department-like the courts in Gambla n99 and similar cases, and like a good deal of the scholarship in this area-assumes that states have a "compelling interest" in ensuring the "best interests" of affected children. n100 The Supreme Court came close to stating the same view in Palmore, although it stopped just short: it described the "best interests" of children as a "substantial" government objective before going on to undercut that proposition by holding that "whatever" the impact on children, their custody may not be reassigned out of concerns for racial prejudice. n101

The difficulty with classifying a child's "best interests" as a compelling state interest, besides the fact that Supreme Court precedent seems to refute the idea, n102 is that the concept is simply too amorphous. n103 It could mean anything from shielding a child from life-threatening harm to simply giving a child a tiny, marginal advantage over available alternatives. To legitimately qualify as "compelling," any potential gain for children must be quantified as significant, not merely extant. n104

Because of the slipperiness of the "best interests" standard, some judges and scholars have concluded that the only child-welfare interest substantial enough to rank as "compelling" is preventing serious harm to a child. n105 But this may well be too narrow. Given the state's basic trust obligation to children and the way in which the state's own future is tied to the well-being and healthy development of the next generation, it seems plausible to understand the state's "compelling" interests as extending beyond merely sparing a child from injury to ensuring that children have the opportunity to flourish. This conclusion would be consistent with the decision in Troxel v. Granville, n106 which left the door open to state intervention to preserve children's important relationships with non- parents even in the absence of proof that they would otherwise be harmed. n107 If this is correct, then race-based decisionmaking in this context is permissible only if it can be demonstrated that taking race into account is needed to substantially benefit children.

Framing the legal question in this way has several implications. First, race may not be considered where it yields only marginal gains for child welfare. Under this view, the Illinois court was plainly wrong in Gambla to rely on race where it found that this consideration tipped the scales only "ever so slightly" in favor of the mother. n108 Benefits so small cannot justify the very real costs of entrenching race-conscious decisionmaking by the government. The U.S. Supreme Court has long emphasized that racial

classifications are costly for society because they "delay the time when race will become a truly irrelevant, or at least insignificant, factor." n109 In the context of custody decisions, they arguably impose distinctive costs as well on individual family members, erecting barriers between parents and children and effectively validating for children "racial designations which stem, at least in part, from a rigid historical system of racial identification." n110 Particularly given these costs, it is indeed difficult, as Twila Perry has written, to imagine a sufficiently strong justification for considering race in custody disputes between a child's parents. n111 In such cases, both parents presumably already have established a loving bond with their child motivating them to be sensitive to their child's needs, and both have demonstrated a willingness to overcome racial boundaries in their own relationship. Under these circumstances, resorting to general considerations of race in deciding custody seems quite unlikely to yield substantial benefits to the child.

Second, given the available empirical evidence about child well-being in transracial adoptions, it is highly doubtful that a broad use of race to decide custody issues could be sustained. Studies overwhelmingly show that children do very well raised in multiracial families. n112 Indeed, researchers have found that transracial placements are as stable and deeply attached as same-race placements, and that "transracial adoptees do as well on measures of psychological and social adjustment as black children

raised inracially in relatively similar socio-economic circumstances." n113 Interview data with adult transracial adoptees generally offer the same positive assessment. n114 Therefore, it will generally be difficult to demonstrate a "substantial benefit" to children from a same-race placement, particularly if the alternative would require a significantly longer wait in temporary foster or institutional care. n115

Yet, there are surely some individual cases where children might benefit substantially from taking race into account. Suppose, for example, that a transracial placement would place an African American child into an isolated, all-white community intensely hostile to African Americans, and that the white adoptive parents had given no serious thought to dealing with this dilemma. Without doubt, it could be shown that placing the child in a less hostile environment would substantially benefit her. Researchers studying child welfare in transracial placements have found that "[i]n particular, a community's racial dynamics can affect transracially adopted children's adjustment," and that "[t]hose making transracial placement decisions should thus consider community- and neighborhood-level influences." n116

Yet, here is where I think Palmore and the HHS interpretation go wrong. Palmore suggests that "whatever" the harm to children, a custody decision cannot "give effect" to prejudice. n117 For its part, HHS contends that even to inquire about the racial diversity and potential hostility of a transracial

placement imposes "different standards." But without inquiring, it is impossible to know if the child would substantially benefit from a different placement.

HHS faults Ohio for failing to subject same-race adoptive placements to the same scrutiny. A presumption that Black parents have special competence to help children grapple with the cruelties of racial prejudice, HHS argues, is nothing more than a stereotype. Yet, the Supreme Court has arguably challenged that notion. In Grutter v. Bollinger, n118 the 2003 case upholding the use of race-based affirmative action at the University of Michigan Law School, the Court held that racial diversity in the classroom is a compelling state interest. The Court accepted that race alone is sufficient to mark the experience of "being a racial minority in a society in which race unfortunately still matters." n119 The contexts are obviously different, but the core proposition carries over: in our society, being a racial minority provides distinctive experience that yields insight into navigating prejudice. n120 It is an insight that cannot be as routinely attributed to whites. Sharon Rush has made the same point effectively in her personal account of raising her daughter in a transracial family, documenting how her experience transformed her own understanding of race and racial prejudice. n121

The Supreme Court thus found that there is a compelling educational benefit from being exposed to

classmates of different races in a law school or college classroom, because the contributions of minority-race students will inevitably be informed by the distinctive experience of living in a society in which "race . . . matters." If we accept that proposition, it requires only a small leap to imagine a similar benefit to children from being exposed to caregivers and playmates of diverse racial backgrounds, and to accept that minority-race caregivers will have a distinctive base of experience to draw upon in addressing issues of racial prejudice. This is not to suggest, of course, that the advantage of this experience is enormous or all- important, nor that considerations of race should predominate. As Hawley Fogg-Davis has written:

> Race matters, but we need to be careful in thinking about how it ought to matter. Racial expectations weigh heavily on our minds and bodies, but we should not think of these expectations as overpowering our capacity to respond to racial ascription in active ways that foster multifaceted self-concepts. n122

Yet the new HHS enforcement policy considers the racial diversity of the neighborhoods, schools, and churches of prospective adoptive parents essentially irrelevant and wholly out of bounds.

In my view, the U.S. Constitution permits states to inquire specifically into the racial diversity and

"hospitality" of transracial child placements for the same reason it permits colleges and universities to consider race in student admissions: because we live in a society in which "race unfortunately still matters." But the government should be permitted to act upon the information it gathers-to delay or deny a transracial placement-only where the child would provably benefit very substantially.

This approach contemplates that the permissible use of race will be determined case by case, after reasonable inquiry into the home life offered by a prospective parent. Race would then be permitted to guide placement decisions only when it could be shown that particular facts relating to a prospective adoptive home, or to a child's developmental needs, established a very strong benefit from same-race placement. Under this approach, it might well be lawful for an agency to prefer a same-race placement of a minority-race child over placement in an isolated, all-white community with white parents who have no sensitivity to the ongoing reality of racial prejudice in contemporary society. Any such judgment must take into account far more than just race, of course. If the parents in the transracial placement were uniquely equipped to meet the child's special health needs, for example, or if superior placements elsewhere were not readily available, so that alternatives would mean continued impermanence in the child's upbringing, the comparative significance of race would quickly fade. But if, all things considered, evidence established that placing a child in a same-race household would

substantially benefit the child, the Constitution should not be understood to stand in the way.

For many, the indeterminacy of requiring judicial assessments of the substantiality of claimed benefits for children will be deeply unsatisfying. Some will object, not unreasonably, that case-by-case balancing will make it easier for caseworkers who categorically oppose transracial adoption to manipulate outcomes, injecting race even where the facts do not prove its substantial importance. n123 Others from a different perspective will object that it compromises the well-being of children by not making their "best interests" the polestar of all placement decisions. And still others will object that the failure to erect a bright-line bar on race discrimination undermines the principle of equality.

Yet, I see no good alternative in a context in which important constitutional values conflict. Palmore itself, as Barbara Woodhouse has pointed out, rested on a categorical intuition: that taking account of race and prejudice perpetuates racial division. n124 Yet what is unsatisfying about Palmore-and what has left the door open to such confusion in the decades since-is its failure to come to grips with the balancing that is inevitably required in this setting. Palmore acknowledged that children have their own powerful interests at stake in this dilemma, and then promptly set them aside in the cause of eradicating racial prejudice. It is messy and can be misused, but finding some balance point between the intersecting interests of society and children with regard to race

and custody seems to me unavoidable given the flaws of contemporary society, in which "race unfortunately still matters."

V. Conclusion

More than three decades after Palmore v. Sidoti, the nature of the legal constraints on considerations of race in public decisions about children remains contested and unsettled. We are, however, making progress toward a consensus. In part because of Congress's intervention through MEPA and the Interethnic Adoption amendments of 1996, and newly aggressive enforcement of federal law, longstanding barriers to transracial adoption are falling away.

Palmore and related changes in federal constitutional and statutory law have not worked a revolution in family composition; indeed, social preferences for intraracial intimacy remain strikingly durable decades after the removal of legal obstacles. n125 Yet, there are signs of change here as well. The numbers of transracial adoptions are growing both domestically and internationally; the share of African American children adopted from foster care by parents of a different race nearly doubled between 1998 and 2004, n126 and in 2006, Ethiopia became the fifth largest country of origin for children adopted internationally in the United States (up from 16th in 2000). n127 And, importantly, studies of families who have bridged racial lines in

parenting continue to be generally reassuring about the outcomes. n128

Yet, as the Illinois court's recent decision in Gambla reflects, many observers continue to believe that race remains a relevant and often important factor in determining the custodial and familial associations of children. The Illinois court, like others before it, resolved the tension by allowing for race to be freely considered in placing children, so long as race is not given overtly dominant weight. n129 That is progress, to be sure-it removes at least the most heavy-handed categorical uses of race as a qualifying characteristic for parenthood- but it plainly leaves the door open for wide reliance on racial preferences and stereotypes that are wholly unsupported and unsupportable.

In stark contrast, the aggressive posture recently taken by HHS in interpreting federal law effectively pushes race entirely from the field of relevant considerations. Its hostility to considerations of race is so strong that it would forbid not only preferences for same-race placements, but even inquiring into the preparedness of transracial adopters to protect their children against racial prejudice. n130

I have suggested that the strict scrutiny required by the Constitution for racial classifications-the standard that drives HHS's interpretation of the federal statutory prohibitions of race discrimination in child placements-does not compel the degree of color-blindness suggested by the HHS's recent

enforcement actions. Strict scrutiny would not permit routine reliance on race as a factor in placement decisions, but leaves room for reliance where considerations of race are demonstrably necessary to achieving substantial gains in the welfare of an affected child. The available social science does not suggest that children are commonly harmed by transracial placements; indeed, in certain respects they appear to enjoy distinct benefits. Yet, studies also suggest that the readiness of transracial adoptive parents to anticipate and address issues relating to race is an important factor in ensuring that success. n131 At a minimum, then, some specialized inquiry into the preparedness of transracial adoptive parents seems justifiable. Beyond that, considerations of race in child placement must depend upon empirical proof that, for a particular child, the benefits of preferring a same-race placement would be sufficiently significant to justify the social costs of race-conscious decisionmaking. While the available evidence suggests this will not be often, it remains incomplete and recognizes-as should the Constitution-that the circumstances and needs of some individual children are exceptional.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law/Adoption/Adoption & Safe Families Act
Family Law/Adoption/Indian Child Welfare Act

Family Law/Delinquency & Dependency/Foster Care

FOOTNOTES:

n1 See, e.g., Gypsy Law: Romani Legal Traditions and Culture (Walter O. Weyrauch ed., 2001); Walter O. Weyrauch, Unwritten Constitutions, Unwritten Law, 56 Wash. & Lee L. Rev. 1211 (1999); Walter O. Weyrauch, Oral Legal Traditions of Gypsies and Some American Equivalents, 45 Am. J. Comp. L. 407 (1997); Walter O. Weyrauch & Maureen Anne Bell, Autonomous Lawmaking: The Case of the "Gypsies," 103 Yale L.J. 323 (1993); Walter O. Weyrauch, The "Basic Law" or "Constitution" of a Small Group, 27 J. Soc. Issues 49 (1971); Walter O. Weyrauch, The Law of a Small Group: A Report on the Berkeley Penthouse Experiments with Emphasis on Penthouse V (Space Sciences Laboratory, Univ. of Cal., Berkeley, Internal Working Paper No. 54, 1967); Walter O. Weyrauch, Law in Isolation: The Penthouse Astronauts, Trans- Action, June 1968, at 39.

n2 See Walter O. Weyrauch, The Romani People: A Long Surviving and Distinguished Culture at Risk, 51 Am. J. Comp. L. 679 (2003); Walter O. Weyrauch, An Immigrant's Encounter with Race in America, 48 Fla. L. Rev. 445 (1996).

n3 466 U.S. 429 (1984).

n4 See Barbara Bennett Woodhouse, "Are You My Mother?": Conceptualizing Children's Identity Rights

in Transracial Adoptions, 2 Duke J. Gender L. & Pol'y 107, 120 (1995) (observing that "[t]ransracial adoption combines some of the most potent dilemmas of modern America . . .").

n5 See Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002); Twila L. Perry, Race Matters: Change, Choice, and Family Law at the Millennium, 33 Fam. L.Q. 461 (1999); Annette R. Appell, Disposable Mothers, Deployable Children, 9 Mich. J. Race & L. 421 (2004); Cristina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 Nw. J.L. & Soc. Pol'y 303 (2006).

n6 See Elizabeth Bartholet, Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative 130-40 (1999); R. Richard Banks, The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action, 107 Yale L.J. 875 (1998).

n7 Roberts, supra note 5, at 165 (asserting that racial politics undergird support for transracial adoption); Banks, supra note 6, at 880 (noting that "race politics" underlie the debate over children's best interests in transracial adoption); Kenneth L. Karst, Law, Cultural Conflict, and the Socialization of Children, 91 Cal. L. Rev. 967, 984 (2003) (observing that in the controversy over transracial adoption "the label 'racial discrimination' is deployed on both sides of the argument").

n8 Palmore, 466 U.S. at 429.

n9 Id. at 433-34.

n10 See Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 385 (2003) (concluding that while some judges continue to limit the Court's mandate on pretextual grounds, "Palmore does appear to have made a difference in the resolution of some litigated disputes").

n11 See Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. Pa. L. Rev. 1163 (1991); Kim Forde-Mazrui, Note, Black Identity and Child Placement: The Best Interests of Black and Biracial Children, 92 Mich. L. Rev. 925, 930-32 (1994) (noting that Palmore left considerable uncertainty in the lower courts).

n12 See Joan Mahoney, The Black Baby Doll: Transracial Adoption and Cultural Preservation, 59 UMKC L. Rev. 487, 497 (1991); David S. Rosettenstein, Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot," 68 St. John's L. Rev. 137 (1994).

n13 See Bartholet, supra note 6, at 130-40 (describing the determination of many child-welfare workers to circumvent federal anti-discrimination mandates through "creative 'interpretations'" of federal law); cf. Solangel Maldonado, Discouraging

Racial Preferences in Adoptions, 39 U.C. Davis L. Rev. 1415, 1457 (2006) (observing that, "[u]ndoubtedly, some agencies continue to race match, in contravention of the law . . .").

n14 See In re Marriage of Gambla, 853 N.E.2d 847 (Ill. App. Ct. 2006).

n15 See id. at 868-69.

n16 See id. at 868 (noting that trial court had "believed that [race] . . . tipped the scale slightly . . ." in favor of the mother).

n17 See Elizabeth Bartholet, Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on with Transracial Adoption, 34 J. Am. Acad. Psychiatry L. 315, 317 (2006) (describing the "dramatic new development . . . on the enforcement front").

n18 See id. at 317-19.

n19 See id.

n20 See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994); Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)).

n21 The statutes were both held unconstitutional in the late 1960s and early 1970s. See In re Adoption of Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967); Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972).

n22 Kennedy, supra note 10, at 3-12.

n23 See id. at 387. Most accounts trace the history of transracial adoption to a 1948 case in which white foster parents in Minnesota adopted the Black foster child in their care. See Hawley Fogg-Davis, The Ethics of Transracial Adoption 3 (2002); Ruth-Arlene W. Howe, Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo, 6 B.U. Pub. Int. L.J. 409, 441 (1997).

n24 See Barbara Melosh, Strangers and Kin: The American Way of Adoption 165 (2002) (recounting how "[t]he optimism of the early civil rights movement inspired some white adopters to claim African American children as their own").

n25 Rita J. Simon & Howard Altstein, Adoption, Race & Identity: From Infancy to Young Adulthood 10 tbl.1.5 (2d ed. 2002).

n26 Id. at 14-15 (quoting position paper of the NABSW presented at its 1972 national conference); see also Barriers to Adoption: Hearings Before the S. Comm. on Labor and Human Res., 99th Cong., 214-18 (1st Sess. 1985) (statement of William T. Merritt, President, Nat'l Ass'n of Black Social Workers).

n27 See Simon & Altstein, supra note 25, at 10 tbl.1.5.

n28 See Matthew L.M. Fletcher, Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival, 28 Am. Indian L. Rev. 35, 39-40 n.25 (2003-2004).

n29 See Cynthia G. Hawkins-Leon, The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis, 36 Brandeis J. Fam. L. 201, 202 (1997-1998); Simon & Altstein, supra note 25, at 18.

n30 Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1901 (2000).

n31 See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). See also 25 U.S.C. §§ 1901-1915; Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 605-23 (2002) (describing ICWA's key features and operation).

n32 See Bartholet, supra note 11, at 1189-96; Joan Heifetz Hollinger, A Guide to the Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996, ch. 1(C) (ABA Center on Child. & Law 1998), available at http://www.acf.hhs.gov/programs/cb/pubs/mepa94/mepachp1.htm (last visited June 4, 2007).

n33 See Palmore v. Sidoti, 466 U.S. 429 (1984).

n34 Id. at 430.

n35 Id.

n36 See id. at 430-31.

n37 Id. at 431.

n38 Palmore, 466 U.S. at 432.

n39 Id. at 433.

n40 Id. at 434; see also Katharine T. Bartlett, Comparing Race and Sex Discrimination in Custody Cases, 28 Hofstra L. Rev. 877, 881 (2000) (observing that Palmore "concluded almost categorically that the harm of considering race in a custody case is greater than the possible gains").

n41 Palmore, 466 U.S. at 433.

n42 U.S.C. § 2000d (2006).

n43 See Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389-91 (1982).

n44 See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(1), 108 Stat. 3518, 4056 (1994).

n45 Id. § 553(a)(2).

n46 Id. For discussion of MEPA's original enactment and its subsequent amendment, see Bartholet, supra note 6, at 130-33; Hollinger, supra note 32.

n47 Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. § 671(a)(18)).

n48 See supra text accompanying notes 27, 32.

n49 Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 675(5)).

n50 See Richard P. Barth et al., From Anticipation to Evidence: Research on the Adoption and Safe Families Act, 12 Va. J. Soc. Pol'y & L. 371, 372-76 (2005). For opposing views of ASFA's impact on children, compare Bartholet, supra note 6, at 188-89 (generally approving ASFA), with Martin Guggenheim, What's Wrong with Children's Rights 174-212 (2005), and Martin Guggenheim, Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles, 20 Emory Int'l L. Rev. 43, 61 (2006) (contending that ASFA reflects "America's penchant for destroying families in the name of advancing children's rights").

n51 See Jess M. McDonald et al., Nation's Child Welfare System Doubles Number of Adoptions from Foster Care, at 1 (Univ. of Illinois Sch. of Soc. Work, Child. & Fam. Res. Ctr. Oct. 2003), available at http://www.fosteringresults/results/reports/pewrepor

ts10-1-03doubledadoptions.pdf; Barth et al., supra note 50, at 385-88 (analyzing increase in adoption rate from foster care since ASFA's enactment).

n52 See Lynette Clemetson & Ron Nixon, Breaking Through Adoption's Racial Barriers, N.Y. Times, Aug. 17, 2006, at A1.

n53 Interagency Task Force on Adoption, America's Waiting Children: A Report to the President from the Interagency Task Force on Adoption (1988).

n54 853 N.E.2d 847 (Ill. App. Ct. 2006).

n55 Id. at 861-62, 870.

n56 Id. at 861-62, 866-68.

n57 Id. at 868. The trial court's decision to match a biracial child with her African American mother rather than with her white father has precedent in a series of earlier divorce custody cases. See Forde-Mazrui, supra note 11, at 935-36 (reviewing cases); Twila L. Perry, Race and Child Placement: The Best Interests Test and the Cost of Discretion, 29 J. Fam. L. 51 (1990-1991).

n58 In re Marriage of Gambla, 853 N.E.2d at 869 (emphasis in original).

n59 Id.

n60 Id.

n61 See Palmore v. Sidoti, 472 So. 2d 843, 844 (Fla. App. Ct. 1985) (among others, Melanie had suffered from head lice and poor hygiene); Kennedy, supra note 10, at 380-81.

n62 See Palmore v. Sidoti, 466 U.S. 429, 430 (1984) (quoting trial court's opinion).

n63 438 U.S. 265 (1978).

n64 Id. at 317-18.

n65 See Gratz v. Bollinger, 539 U.S. 244, 246-47 (2003).

n66 Drummond v. Fulton Co. Dep't of Fam. & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (en banc). For an eloquent discussion of Drummond and its aftermath, see Carl E. Schneider, Strangers and Brothers: A Homily on Transracial Adoption, 2 Whittier J. Child & Fam. Advocacy 1 (2003).

n67 Id. at 1205.

n68 Id.

n69 See Johnson v. California, 543 U.S. 499, 505 (2005); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995).

n70 Drummond, 563 F.2d at 1205-06.

n71 Id. at 1206.

n72 See Johnson, 543 U.S. at 509-15.

n73 Kennedy, supra note 10, at 433. Bartholet, writing in 1999, similarly observed that HHS "has been awfully quiet" and found no "evidence of the kind of enforcement activity that would make significant change in the near future seem likely." Bartholet, supra note 6, at 133; see also Schneider, supra note 66, at 4 & n.16 (discussing the HHS's failure to enforce MEPA vigorously).

n74 Letter of Findings, from Lisa M. Simeone, Regional Manager of the Office for Civil Rights, U.S. Dep't of Health & Hum. Servs., to Suzanne A. Burke, Director of the Hamilton Cty. Dep't of Hum. Servs., & Tom Hayes, Director of the Ohio Dep't of Job & Fam. Servs. (Oct. 20, 2003) [hereinafter Ohio Letter of Findings], available at www.hhs.gov/ocr/mepa/hamilton co2.pdf.

n75 See Bartholet, supra note 17, at 317.

n76 Ohio Letter of Findings, supra note 74, at 15.

n77 Id.

n78 Id. at 16.

n79 Id.

n80 Id. at 17.

n81 Ohio Letter of Findings, supra note 74, at 18.

n82 Id.

n83 Id.

n84 Civil Rights Act of 1964, 42 U.S.C. § 2000a.

n85 Ohio Letter of Findings, supra note 74, at 18-19.

n86 Id.

n87 See id. at 54, 58.

n88 Id. at 55-56. HHS found that agency had repeated its violation of title VI when it made similar inquiries of other white prospective adoptive parents, including Chad and Ruth Lamm of rural Easton, Illinois stating: HCDHS employed race-based criteria in evaluating the Lamms as prospective adoptive parents for Leah. HCDHS sought out information about how much contact the Lamms had with the African American community and whether there were African American teachers or students in the local school system . . . HCDHS based its need for race-based inquiries solely on the fact that Leah was of a different race than the Lamms. Id. at 20.

n89 Bartholet, supra note 6, at 132.

n90 See id at 132-33 (quoting HHS "Guidance" Memorandum dated June 5, 1997).

n91 Penalty Letter from Wade F. Horn, Assistant Secretary for Children and Families, HHS, to Tom Hayes, Director of the Ohio Dep't of Job & Fam.

Servs. (Oct. 20, 2003), available at www.law.harvard.edu/faculty/bartholet/mepa.php (last visited Mar. 6, 2007).

n92 Bartholet, supra note 17, at 319.

n93 Letter of Findings from Roosevelt Freeman, Regional Manager of HHS Office for Civil Rights, to Kim S. Aydlette, Director of the South Carolina Dep't of Soc. Servs. (Oct. 31, 2005) [hereinafter South Carolina Letter of Findings], available at http://www.hhs.gov/ocr/mepa/LOFFINALOct3105.pdf

n94 Id. at 22.

n95 Id.

n96 See id. at 24.

n97 Id. at 23. In addition, HHS also found that South Carolina violated MEPA and title VI by going out of its way to accommodate the racial preferences of birth mothers in placing children and using race as a "'tie-breaking' factor among families otherwise equally appropriate for a child." Id. at 20, 26-27.

n98 Penalty Letter from Wade F. Horn, Assistant Secretary for Children and Families, HHS, to Kim Aydlette, Director of South Carolina Dep't of Soc. Servs., at 3 (Feb. 24, 2006), available at www.law.harvard.edu/faculty/bartholet/mepaSCsignedpenaltyletter.pdf.

n99 See supra text accompanying note 54.

n100 See, e.g., Ohio Letter of Findings, supra note 74, at 11 ("The only compelling governmental interest for race-based decisionmaking in the context of adoption and foster care placements is protecting the 'best interests' of the child who is to be placed.").

n101 Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984). As Margaret Brinig points out, it is of course possible that the trial court's concern with the child's "best interests" was pretextual and intended to "provide cover for a more sinister agenda." Margaret F. Brinig, The Child's Best Interests: A Neglected Perspective on Interracial Intimacies, 117 Harv. L. Rev. 2129, 2147 (2004).

n102 Palmore itself seems inconsistent with genuine recognition of a child's best interests as a compelling public interest, since the trial court's undisturbed "best interests" finding was insufficient to sustain its custody order. In addition, Reno v. Flores, 507 U.S. 292, 304 (1993), DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993), and Caban v. Mohammed, 441 U.S. 380, 391 (1979), each subordinate claims concerning the "best interests" of children to other constitutional values, suggesting that the asserted interest is something less than truly "compelling."

n103 Cf. Richard W. Garnett, Taking Pierce Seriously: The Family, Religious Education, and Harm to Children, 76 Notre Dame L. Rev. 109, 114 (2000); cf. Perry, supra note 57, at 56-57 (contending

that "in the child placement decisionmaking where racial differences are present, the touchstone rule of custody- the best interests rule-does little to assist in analyzing or resolving the difficult issues often presented").

n104 See David D. Meyer, The Constitutional Rights of Non-Custodial Parents, 34 Hofstra L. Rev. 1461, 1489-90 (2006).

n105 See Joan Catherine Bohl, Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm, 48 Drake L. Rev. 279, 331 (2000); Garnett, supra note 103, at 114; In re Custody of Smith, 969 P.2d 21, 28-29 (Wash. 1998), aff'd on other grounds, sub. nom. Troxel v. Granville, 530 U.S. 57 (2000).

n106 530 U.S. 57 (2000).

n107 For an extended analysis of the opinions in Troxel, see David D. Meyer, Lochner Redeemed: Family Privacy After Troxel and Carhart, 48 UCLA L. Rev. 1125 (2001).

n108 In re Marriage of Gambla, 853 N.E. 2d 847, 871 (Ill. App. Ct. 2006).

n109 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); see also Johnson v. California, 543 U.S. 499, 507 (2005)

(discussing the harm that comes from government policies that "perpetuat[e] the notion that race matters most").

n110 Perry, supra note 57, at 69. For additional discussion of the costs to children, see Elizabeth Bartholet, Race Separatism in the Family: More on the Transracial Adoption Debate, 2 Duke J. Gender L. & Pol'y 99, 100 (1995) (observing that barriers to transracial adoption "separate children and prospective parents into racial categories, assign children to racially-matched parents, and hold children for whom there is no racial match available . . ."); Bartholet, supra note 11, at 1223-26 (reviewing "the evidence as to costs for children of current inrace placement preferences"); Forde-Mazrui, supra note 11, at 936-43 (describing "the psychological costs to individual Black children when courts and agencies practice racial matching.").

n111 See Perry, supra note 57, at 126-27.

n112 See Rita J. Simon & Rhonda M. Roorda, In Their Own Voices: Transracial Adoptees Tell Their Stories 13-25 (2000); Simon & Altstein, supra note 25; Arnold R. Silverman, Outcomes of Transracial Adoption, 3 Future of Children 104, 117 (1993); Kathleen L. Whitten, Permanent Families for African-American Foster Children in an Imperfect World, 12 Va. J. Soc. Pol'y & L. 490, 495-97 (2005). But cf. Margaret F. Brinig, Promoting Children's Interests Through a Responsible Research Agenda,

14 U. Fla. J.L. & Pub. Pol'y 137, 149-51 (2003) (noting limitations in available studies).

n113 Bartholet, supra note 11, at 1255.

n114 See Kennedy, supra note 10, at 468-78; Simon & Roorda, supra note 112.

n115 See Schneider, supra note 66, at 9.

n116 Whitten, supra note 112, at 497.

n117 Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984).

n118 539 U.S. 306, 343 (2003).

n119 Id. at 333.

n120 See Tanya Washington, Loving Grutter: Recognizing Race in Transracial Adoptions, 16 Geo. Mason U. Civ. Rts. L.J. 1, 10-12 (2005). Hawley Fogg-Davis has written perceptively about the complex process of "racial navigation," in which "individuals . . . challenge existing racial meanings in a lifelong process of self-reflection and -revision." Fogg-Davis, supra note 23, at 2.

n121 See Sharon E. Rush, Loving Across the Color Line: A White Adoptive Mother Learns About Race (2000). Rush writes, for instance, "[a]s I write this book and look back over the years . . . , my understanding of the complexities of race make me realize how limited my views were when my daughter was a baby." Id. at 23.

n122 Fogg-Davis, supra note 23, at 113.

n123 Randall Kennedy, for example, argues that "pragmatic considerations counsel in favor of the institution and enforcement of a strict antidiscrimination norm in adoption," because "[n]othing less will break the deeply entrenched habit of race matching that remains rife throughout this country." Kennedy, supra note 10, at 417-18; accord Bartholet, supra note 6, at 130 (warning that "any leeway given to utilize race would be used to evade [the antidiscrimination mandate]").

n124 Woodhouse, supra note 4, at 124.

n125 See Rachel Moran, Interracial Intimacy 99-101 (2001); Banks, supra note 6, at 887-88; Bartholet, supra note 11, at 1204-06; Joanna L. Grossman & John DeWitt Gregory, The Legacy of Loving, 51 How. L.J. (forthcoming 2007).

n126 See supra note 52 & accompanying text.

n127 See Jane Gross & Will Connors, Surge in Adoptions Raises Concerns in Ethiopia, N.Y. Times, June 4, 2007.

n128 See supra notes 112-14 & accompanying text. But cf. Brinig, supra note 101, at 2150-59 (presenting empirical data suggesting some additional risks for children raised by interracial couples).

n129 See supra text accompanying notes 58-60.

n130 See supra text accompanying notes 94-97.

n131 See Whitten, supra note 112, at 497.